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Supreme Court, U.S.
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No. 04-1524

IN THE

Supreme Court of the United States

KEM L. RALPH,

Petitioner,

v.

MONSANTO COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's decision denying petitioner's motion for relief from final judgment under Fed. R. Civ. P. 60(b), which asserted that the district judge was required to recuse himself under 28 U.S.C. § 455(a).

2. Whether the court of appeals erred in affirming the district court's decision denying petitioner's request for discovery in support of his Rule 60(b) motion.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those identified in the caption.

RULE 29.6 STATEMENT

Monsanto has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 122 Fed. Appx. 510. The oral decision of the district court (Pet. App. 2-24) is unreported. A prior decision of the court of appeals is reported at 382 F.3d 1374.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2005. Pet. App. 1. The petition for a writ of certiorari was filed on May 13, 2995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *Prior Litigation (Ralph I).*

a. This is a patent-infringement and contract dispute arising out of respondent Monsanto's efforts to protect its patented biotechnology. After investing substantial time, expertise, and expense, Monsanto developed two important recombinant DNA technologies for soybean and cotton plants. Roundup Ready® seed contains a patented gene that renders plants such as soybeans and cotton resistant to glyphosate-based herbicides, freeing growers to spray herbicides like Roundup® over their fields without harming their crops. Bollgard® cottonseed contains a patented protein that is toxic to certain insects, protecting cotton plants from damage caused by pests. Some cottonseed contains both the herbicide-tolerant and pest-resistant traits. These genetically engineered traits are claimed in several patents held by Monsanto. *See generally Monsanto Co.* v. *Ralph*, 382 F.3d 1374, 1377-1378 (Fed. Cir. 2004) ("*Ralph I*").

Monsanto licenses seed companies to incorporate its patented herbicide-tolerant and insect-resistant traits into seeds containing their own soybean and cotton germplasm and then to sell the seeds to growers, subject to certain conditions. Specifically, Monsanto requires growers who purchase seeds containing its patented biotechnology to obtain a license, typically by signing a license agreement with Monsanto. This license agreement provides that the seeds containing Monsanto's patented biotechnology are to be used "for planting a commercial crop only in a single season," and expressly states that the grower-licensee may not "save any crop produced from this seed for replanting, or supply saved seed to anyone for replanting." *Ralph I*, 382 F.3d at 1377.

Monsanto's insistence on a limited license reflects the fact that the seeds containing Monsanto's patented biotechnology self-replicate at an exponential rate, leaving licensees at the end of the growing season with an abundance of seeds that could be replanted or sold on the black market. A single Roundup Ready® soybean seed typically produces a plant

that yields 25 to 50 genetically identical seeds, and a single Bollgard® cotton seed usually produces a plant that yields 70 to 120 seeds containing Monsanto's technology. *See Ralph I* C.A. App. 3722, 3735-3736, 3830-3832.[1] Allowing soybeans or cotton containing the patented technology to be saved for replanting or sale as seed would mean that Monsanto's ability to protect or exploit its patented technology would effectively be lost as soon as the first generation of the product was introduced into the market without reasonable license restrictions.

b. On June 10, 1998, petitioner executed a license agreement and received a single-season license for Roundup Ready® soybeans and Bollgard® cottonseed. After an investigation indicated that petitioner might have saved and replanted seeds containing Monsanto's patented technology, Monsanto filed suit against petitioner in the United States District Court for the Eastern District of Missouri for breach of contract and patent infringement. The case was assigned to District Judge Rodney W. Sippel.

Monsanto requested discovery into the locations where petitioner had planted his crops and stored soybeans and cottonseed. On February 2, 2000, the district court ordered petitioner to answer Monsanto's interrogatories regarding the location of the seed, and entered a temporary restraining order preventing petitioner from tampering with any such seed until Monsanto had tested it to determine whether petitioner had made infringing use of the patented technology. *Ralph I* C.A. App. 550-552. On February 24, 2000, the district court entered an order permitting Monsanto to test areas that petitioner had identified in an affidavit, and prohibited petitioner from "selling, moving, disposing of, destroying or otherwise transferring any harvested crops, seed, or

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[1] "*Ralph I* C.A. App." refers to the physical compilation of the record filed by the parties on petitioner's appeal to the Federal Circuit in the underlying litigation. "*Ralph II* C.A. App." refers to the physical compilation filed by the parties on petitioner's appeal from the denial of his Rule 60(b) motion.

crop residue in his possession . . . until such matter is tested and sampled pursuant to this Order." *Id.* at 563. Tests of petitioner's disclosed crops and seeds confirmed that petitioner had planted about 990 bags of saved soybeans and about 400 bags of saved cottonseed in violation of the license agreement, and also had stored about 3,000 bags of saved soybeans falling within the scope of Monsanto's patent grant. *See id.* at 5358-5361.

Monsanto also learned, however, that petitioner had cleaned, treated, and delinted an additional 1,867 bags of cottonseed that had not been disclosed. On March 1, 2000, Monsanto contacted petitioner's counsel to inquire into the whereabouts of that seed. *See Ralph I* C.A. App. 631-632. On March 3, 2000, petitioner's counsel stated that petitioner had burned all of that seed and—in an apparent effort to stop Monsanto from investigating further—offered to stipulate to a rebuttable presumption that the seed contained Monsanto's patented biotechnologies. *See id.* at 633-637.

Monsanto decided to continue its investigation and took petitioner's deposition. Petitioner stated under oath at a deposition that he took all 1,867 bags of cottonseed to a gravel pit and burned them. Petitioner specifically denied selling or transferring any cottonseed. *See Ralph I* C.A. App. 599-601. At a separate deposition on August 8, 2000, petitioner repeated his story that he had burned all of the cottonseed that was saved from the 1999 crop and had not transferred any cottonseed to anyone. *Id.* at 683. This testimony was false, as Monsanto discovered through further investigation. In fact, a large number of those bags of cottonseed had not been burned but instead had been sold on the black market to other growers. *See id.* at 1257-1259, 2032-2041.[2]

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[2] Petitioner also conspired with another grower to conceal the fact that that grower had also saved cottonseed containing Monsanto's patented technology and had that cottonseed cleaned and delinted for planting in another season, in violation of his licensing agreement with Monsanto. Petitioner was eventually prosecuted for and pleaded guilty to mail

c. Monsanto moved for sanctions against petitioner in light of his violation of court orders and false statements in discovery. After an evidentiary hearing, the district court granted Monsanto's motion for sanctions. Finding that petitioner had engaged in a "systematic pattern of lying" that had prejudiced Monsanto (*Ralph I* C.A. App. 2736-2737), the court concluded that the appropriate sanction was to strike petitioner's answer, affirmative defenses, and counterclaims. *Id.* at 2738-2739. The court accordingly entered judgment for Monsanto, and ordered the case to proceed to trial only on the issue of damages. *Id.* at 2739.

The jury found that petitioner had improperly saved 1,234 bags of Roundup Ready® soybeans and 925 bags of Bollgard® cottonseed. *Ralph I* C.A. App. 4491-4492. Those findings resulted in trebled patent-infringement damages of $2,937,527.07 and, in the alternative under the license agreement's liquidated damages provision, breach of contract damages of $2,741,543.95. Final judgment was entered on July 9, 2003. *Id.* at 73-75.

d. On appeal, the Federal Circuit affirmed the district court's imposition of sanctions, including its decision to strike petitioner's pleadings. *Ralph I*, 382 F.3d at 1380-1382. The court of appeals stressed that the district court's sanction was appropriate because petitioner's misconduct had "undermined the integrity of the court and the judicial system." *Id.* at 1382. The court affirmed the award of patent infringement damages but reversed the award of liquidated damages. *Id.* at 1383-1385.

2. *Recusal/Rule 60(b) Proceedings (Ralph II).*

a. Before becoming a district court judge, Judge Sippel was a partner at the law firm of Husch & Eppenberger in St. Louis. He rejoined that firm in 1995 after serving as Chief of Staff for Congressman Richard Gephardt from 1993 to 1995. *Ralph II* C.A. App. 920. On May 15, 1997, Presi-

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fraud based on that conduct, and was sentenced to four months' imprisonment. *See Ralph I* C.A. App. 5730-5748.

dent Clinton nominated Sippel for a seat on the district court. While awaiting a decision by the Senate on his nomination, Sippel was preparing full-time for trial in a large litigation matter ("the CVC litigation") that was scheduled to go to trial in early October 1997. *See id.* at 916-917, 974.

In August 1997, Husch & Eppenberger was retained by Monsanto to serve as local counsel in a dispute between Monsanto and Pioneer Hi-Bred International, a seed manufacturer. Pioneer had filed suit against Monsanto on March 27, 1997, for breach of an agreement between the parties to develop genetically modified corn incorporating a bacterium that expresses an insecticidal protein causing the plant to repel damaging insects. *See Ralph II* C.A. App. 921-937 (Pioneer Complaint); *see also Pioneer Hi-Bred Int'l, Inc.* v. *Monsanto Co.*, No. 4:97CV01609, 2001 WL 170410, at *2 (Jan. 2, 2001), *judgment amended*, 2001 WL 34127923 (E.D. Mo. Feb. 20, 2001).

In compiling a team of lawyers who might be available to assist Monsanto's lead counsel with the Pioneer litigation, the partner in charge of the case for Husch & Eppenberger, Joseph Conran, included Sippel on the list. Although Conran knew that Sippel was not available to work on any cases other than the CVC matter at the time, Conran hoped that Sippel would become available after the CVC litigation concluded. *Ralph II* C.A. App. 916-917. On August 11, 1997, Conran filed an Entry of Appearance form listing himself, Matthew D. Menghini, and Rodney W. Sippel as counsel for Monsanto in the Pioneer case. Sippel did not sign that entry of appearance. *See id.* at 357.

Sippel's work on the CVC litigation continued throughout the summer and fall of 1997 until the trial concluded in November 1997. *See Ralph II* C.A. App. 974-975. In the meantime, Sippel's nomination to the district court was confirmed by the Senate on November 8, 1997. After winding down his practice, Sippel left Husch & Eppenberger to join the bench in January 1998. On January 27, 1998, Judge Sippel signed and served a Notice of Withdrawal as counsel for

Monsanto in the Pioneer litigation, which was granted on January 30, 1998. *Id.* at 353-354.

From August 11, 1997, when Conran first entered an appearance for Sippel in the Pioneer litigation, until January 1998, when Sippel left Husch & Eppenberger, Sippel did not spend any time working on the Pioneer case. *See Ralph II* C.A. App. 916. Sippel did not spend any time consulting with the team, participating in meetings, or reviewing documents. In fact, Judge Sippel stated on the record that he "billed no time to [the Pioneer] case," and that he "had no knowledge about that case." *Id.* at 944. The majority of documents filed in the Pioneer litigation with Sippel's name in the signature block (but not his signature) were motions for pro hac vice admission of lead counsel from Covington & Burling (*see id.* at 565-567, 570-572, 575-577, 580-582, 585-587) and a motion for leave to file a reply memorandum in excess of the page limit set by the local rules (*id.* at 654-655).

Nor did Judge Sippel work on any "saved seed" cases like this litigation or any other cases for Monsanto during his tenure at Husch & Eppenberger from 1995 until taking the bench. *See Ralph II* C.A. App. 917, 943, 958, 976. It was only in 1996 that Monsanto began marketing genetically modified seed (*see id.* at 976-977), and at least a year after that before any litigation over "saved seed" would have been possible—about the time that Sippel became a judge.

b. Judge Sippel began presiding over the instant litigation on January 28, 2000, more than two years after he joined the bench. At that time, the lawyers representing Monsanto—Joseph Orlet, Adam Miller, and Erik Hansell—were with another the law firm in St. Louis, and Husch & Eppenberger had no connection to the case. In January 2002, approximately four years after Judge Sippel went on the bench, their practice group was acquired by Husch & Eppenberger, and Orlet, Miller, and Hansell joined the new firm. At that point, Judge Sippel notified the parties of his former connection to the firm and informed them that none of the attorneys working on this litigation had been with Husch & Eppenberger before he left. Until that time, Judge

Sippel had followed a blanket policy of recusing himself from any case involving his former firm. Counsel for Ralph did not argue at that time that Judge Sippel should have recused himself. *See Ralph II* C.A. App. 968.

While Judge Sippel notified the parties of his prior connection to Husch & Eppenberger, he did not recall that he had entered an appearance in the Pioneer litigation and therefore did not disclose that fact. Counsel for petitioner supposedly first learned of that fact on January 7, 2004, when a reporter contacted him for a comment on a recusal motion filed in an antitrust case, *Blades* v. *Monsanto Co.*, No. 4:01-CV-065-RWS (E.D Mo.), in which Judge Sippel was the presiding judge. The plaintiffs in *Blades* also argued that Judge Sippel should have recused himself because of his appearance in the Pioneer litigation.

After a hearing in the *Blades* case, Judge Sippel concluded that he was not required to recuse himself. *See Ralph II* C.A. App. 819-820. During the hearing, he made clear on the record that, while at Husch & Eppenberger, he had never worked on any saved-seed cases, never worked on the Pioneer litigation, never talked to Joseph Conran about the case, never talked to anyone at Monsanto about the case, never read a document about the case, and never even read the complaint. *Id.* at 816. He therefore concluded that recusal was not required under 28 U.S.C. § 455(a) because a reasonable person, knowing that he did not work on the Pioneer case and did not have anything to do with it, would not believe that he was interested or biased. *Id.* at 819-820.

c. Despite Judge Sippel's conclusions in the *Blades* case that his recusal was not required, petitioner filed, on February 24, 2004, a motion for relief from judgment under Fed. R. Civ. P. 60(b) on the ground that Judge Sippel should have recused himself from this case.[3] Petitioner also re-

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[3] Petitioner initially invoked both 28 U.S.C. § 455(a) and § 455(b)(2) in support of his motion. In this Court he has relied solely on § 455(a). *See* Pet. for Cert. i, Questions Presented.

quested extensive discovery of, *inter alia*, information about (a) every invention which Monsanto in any way licensed to Pioneer Hi-Bred International or permitted Pioneer to use by a Development/License Agreement between Monsanto and Pioneer dated July 1, 1993, (b) every other matter initiated prior to January 30, 1998, in which any lawyer associated with Husch & Eppenberger formed an attorney-client relationship with Monsanto or provided any legal services to Monsanto (including the amount of attorney's fees that Monsanto paid for those services), (c) the total amount of attorney's fees that Monsanto paid to Husch & Eppenberger for services rendered in each year from 1990 through 1998, and (d) the date, subject matter and a description of each communication (including correspondence, emails, faxes and other documents) by Monsanto or any person on behalf of Monsanto, to, from, or with Sippel while he served in the office of Congressman Gephardt. *See Ralph II* C.A. App. 839-853.

On March 4, 2004, Judge Sippel held a hearing on petitioner's Rule 60(b) motion. *See Ralph II* C.A. App. 938-999. Judge Sippel explained that, when his name was added to the entry of appearance form in the Pioneer litigation, he "was not working on anything else but the [CVC litigation]," and before that trial was finished, he was confirmed by the Senate and started wrapping up his legal practice. *Id.* at 974-975. Because, Judge Sippel explained, the facts demonstrated that he "never had anything to do with the Pioneer/Monsanto litigation," he concluded that the average person would have no reason to question his impartiality, and therefore his recusal was not warranted under § 455(a). *Id.* at 984-985.

Finally, the court denied petitioner's motion for discovery in support of his Rule 60(b) motion. The court noted that all of the information about cases involving Monsanto and the lawyers who represent them was a matter of public record in court documents. The court also noted that the party seeking recusal has the burden of coming forward with a reasonable basis to conduct discovery. The court therefore

found that there was no good-faith basis for petitioner's discovery requests. *See Ralph II* C.A. App. 993-996.

d. Petitioner appealed the district court's denial of his Rule 60(b) motion and his motion for discovery. The court of appeals summarily affirmed. Pet. App. 1.

ARGUMENT

The court of appeals affirmed without opinion the district court's decision denying petitioner's motion for relief from judgment under Rule 60(b), which argued that the district judge should have recused himself under 28 U.S.C. § 455(a), as well as petitioner's motion for discovery in support of his Rule 60(b) motion. That summary decision presents no issue warranting this Court's review. Although petitioner argues that the courts of appeals are divided as to the proper standard of appellate review of a district judge's decision not to recuse himself under § 455(a), in fact no conflict exists on the standard of review applicable on the circumstances presented here—a Rule 60(b) motion seeking to retrospectively overturn a final judgment on the ground that the district judge should not have sat in the case. In any event, the district court's decisions to deny petitioner's Rule 60(b) motion and request for discovery in support of that motion were clearly correct. This Court should therefore deny certiorari.

1. a. Petitioner principally argues (Pet. 7-9) that this Court should grant review because the courts of appeals have supposedly reached conflicting conclusions about the proper standard of appellate review of a district court's recusal decision under 28 U.S.C. § 455(a). The Second, Third, Fifth, Eighth, and Ninth Circuits have held that such decisions are subject to review only for abuse of discretion. *See In re Kensington Int'l, Ltd.*, 368 F.3d 289, 301 (3d Cir. 2004); *Moran* v. *Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (*en banc*); *In re Billedeaux*, 972 F.2d 104, 105 (5th Cir. 1992); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-1313 (2d Cir. 1988); *United States* v. *Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988). Those circuits' rulings are consistent with

the House and Senate reports accompanying enactment of § 455(a), which specifically observed that enactment of that provision was not designed to alter the preexisting standard of appellate review on disqualification issues, and that "[t]he issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion." H.R. Rep. No. 93-1453, at 5 (1974); S. Rep. No. 93-419, at 5 (1973).

As petitioner points out, however, the Seventh Circuit has stated in some cases that it will review recusal decisions *de novo*. *See Hook* v. *McDade*, 89 F.3d 350, 353 (7th Cir. 1996); *Taylor* v. *O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989); *United States* v. *Balistrieri*, 779 F.2d 1191, 1203 (7th Cir. 1985). For several reasons, however, this case is not an appropriate vehicle to resolve any divergence of views between the courts of appeals on this point.

First, the Federal Circuit did not issue any opinion in this case. Thus, although, as petitioner points out (Pet. 7), the Federal Circuit may well have followed the Eighth Circuit in applying an abuse-of-discretion standard in this case, it is impossible to know with certainty what standard of review was applied.[4] In addition, because the Federal Circuit did not offer any reasoning for its ruling, it is also impossible to be certain that the standard of review made any difference to the ultimate outcome in the case. The Federal Circuit may well have summarily affirmed because it concluded that the district court's decision was so plainly correct that it would survive any standard of review.

Second, even the Seventh Circuit—which is the only circuit that has stated that *de novo* review of recusal decisions is appropriate in some circumstances—has not suggested that it would apply *de novo* review under circum-

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[4] The Federal Circuit generally follows the law of the applicable regional circuit on issues unrelated to patent law, including issues concerning the disqualification of a trial judge. *See Hewlett-Packard Co.* v. *Bausch & Lomb Inc.*, 882 F.2d 1556, 1567 n.8 (Fed. Cir. 1989).

stances like those presented here, where a litigant seeks to undo a final judgment on the ground that the trial judge should not have heard the case in the first instance. To the contrary, the Seventh Circuit has made clear that a district court's denial of a Rule 60(b) motion based on 28 U.S.C. § 455(a) is subject to review on appeal only for abuse of discretion. *See Williamson* v. *Indiana Univ.*, 345 F.3d 459, 464 (7th Cir. 2003). As the Seventh Circuit has explained, the decision to reopen a final judgment under Rule 60(b) is generally committed to the district court's sound discretion, and such relief is to be awarded only under "exceptional circumstances." *See id.* None of the Seventh Circuit cases cited by petitioner in support of *de novo* review involved denial of a Rule 60(b) motion.[5] Thus, even if this case had been litigated in the Seventh Circuit, there is no reason to believe that that court would have applied any different standard of review or arrived to any different outcome.

b. This Court's review is also not warranted because the district court's decision to deny relief under Rule 60(b) was clearly correct and should be upheld under any standard of review. As this Court has explained, Section 455(a) warrants judicial recusal only when "a reasonable person, knowing all the circumstances," would doubt the judge's impartiality. *See Sao Paulo State of Fed. Rep. of Brazil* v. *American Tobacco Co.*, 535 U.S. 229, 232-233 (2002) (*per curiam*); *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988). In light of "all the circumstances," there could be no reasonable basis for doubting Judge Sippel's impartiality.

Judge Sippel made clear on the record that, before becoming a district judge, he never performed any work for Monsanto on the Pioneer litigation, never worked on any

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[5] *See Hook*, 89 F.3d at 352-353 (interlocutory mandamus petition); *Taylor*, 888 F.2d at 1193, 1200 (appeal from final injunction); *Balistrieri*, 779 F.2d at 1195-1196 (appeal from judgment of conviction). The same is true of the Second and Fifth Circuit cases in which dissenting judges argued in favor of *de novo* review. *See Billedeaux*, 972 F.2d at 104 (interlocutory mandamus petition); *Drexel Burnham*, 861 F.2d at 1309 (same).

saved-seed litigation, and did not work on any other cases for Monsanto after rejoining the firm in 1995. The only facts even tangentially connecting Judge Sippel to Monsanto were that (a) his former law partner, Joseph Conran, entered an appearance for him in the Pioneer litigation in case he would become free after the CVC litigation concluded, and (b) his name appeared in the signature block of various filings, most of which were pro forma motions for *pro hac vice* admission. Judge Sippel explained, however, that he did not review any of the papers filed for Monsanto in the Pioneer case. Petitioner's mere speculation to the contrary is insufficient to raise a reasonable question about Judge Sippel's impartiality.

This case is quite similar to *Sao Paolo*, where this Court ruled that the Fifth Circuit had erred in concluding that a district judge should have recused himself based on the fact that his name had appeared on an amicus curiae brief in a related matter. As the Court explained, the Fifth Circuit's recusal decision was mistakenly based on "what a reasonable person would believe *without* knowing (or giving due weight to the fact) that the judge's name was added mistakenly and without his knowledge." 535 U.S. at 233. The proper query, the Court made clear, is what a reasonable person in possession of all the relevant facts would believe. *See id.* In *Sao Paolo*, the district judge "took no part in the preparation or approval of the *amicus* brief; indeed, he was only 'vaguely aware' of the case." *Id.* This Court held that when those facts were taken into account, "it is self-evident that a reasonable person would not believe he had any interest or bias." *Id.* Similarly, Judge Sippel was at most "vaguely aware" of the Pioneer litigation. Moreover, his name did not appear on any filing with the attorneys for Monsanto in this case, none of whom worked at Husch & Eppenberger when Judge Sippel was a partner there.

Although petitioner relies heavily on *Liljeberg*, that decision has no application to this case. In *Liljeberg*, the presiding judge was a trustee of a university that was actively negotiating with one of the parties to a lawsuit before the

judge over the purchase of a parcel of land on which to build a hospital. 486 U.S. at 850. The judge remained a trustee during the negotiations and while the litigation was pending before him. The university stood to gain significantly from the sale, and the pending litigation directly affected the university's ability to continue negotiations. *Id.* at 853-854. There was therefore a direct connection between the pending sale, in which the university and the judge (as one of its trustees) were interested, and the litigation over which the judge presided. By contrast, there is no connection between the Pioneer case and this case. The Pioneer litigation was a commercial dispute between Monsanto and Pioneer; it did not involve saved seed and did not involve either soybeans or cotton, which are at issue in this case. Other than the fact that the Pioneer case, like this case, involved Monsanto's plant biotechnology—in the Pioneer case, utilized in corn—the two cases are entirely different.

Petitioner notes (Pet. 15-17) that, in *Liljeberg*, this Court concluded that "[s]cienter is not an element of a violation of § 455(a)," 486 U.S. at 859, and ruled that the district judge's impartiality was reasonably open to question in that case, even though the judge had momentarily forgotten the underlying facts that created the appearance of impropriety—namely, his participation, as a trustee of an interested party, in a pending real estate transaction related to the litigation before him. Petitioner argues that, so too here, Judge Sippel should have been required to recuse himself under § 455(a), even though he had long forgotten (if he ever knew) that his name had appeared on papers for Monsanto in the Pioneer litigation.

This argument misconceives the basis for the conclusion that Judge Sippel was not required to recuse himself. The central point is not that Judge Sippel forgot that his name appeared on the Pioneer papers; rather, it is that the Pioneer case created no basis for Judge Sippel's recusal in this case, for the Pioneer case had nothing to do with the instant litigation. Moreover, as Judge Sippel stated, he did no work on any saved-seed litigation at Husch & Eppenberger and no

work at all for Monsanto after he rejoined the firm in 1995. Thus, even if Judge Sippel had fully recalled the details of the Pioneer litigation, his recusal from this case still would not have been warranted.

Petitioner further argues (Pet. 17-18) that, because Judge Sippel had an attorney-client relationship with Monsanto, supposedly created by his appearance on papers filed for Monsanto in the Pioneer litigation, he must be presumed to have gained access to Monsanto's client confidences during that litigation. Again, however, petitioner's argument fails because of the lack of any connection between the issues in the Pioneer case and the issues in this case. And even if, when he was in private practice, Judge Sippel once had a duty of loyalty to Monsanto as a client arising out of the Pioneer litigation, the law presumes that Article III judges are able to shed such loyalties to former clients and render impartial justice once they take judicial office. Otherwise, a federal judge could never sit on any case involving a party that was once his client—but that is clearly not the law. *See Carr* v. *Fife*, 156 U.S. 494, 498 (1895); *Sphere Drake Ins. Ltd.* v. *All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002); *Chitimacha Tribe of La.* v. *Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir. 1982); *National Auto Brokers Corp.* v. *General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978).

2. Petitioner contends that the district court erred in denying his request for discovery in support of his Rule 60(b) motion. Pet. 12-13. That submission raises no issues warranting this Court's review. There is no dispute that discovery rulings on recusal motions are subject to review on appeal only for abuse of discretion, *see In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997), and that deference is only heightened where the recusal argument is made in support of a Rule 60(b) motion. Given that relief from judgment under Rule 60(b)(6), the provision invoked by petitioner, is available only in "extraordinary circumstances," *Ackermann* v. *United States*, 340 U.S. 193, 199, 202 (1950), it is entirely appropriate for a district court to deny discovery in support of such a motion where, as here, the movant has

not adduced evidence that on its face would suggest that relief from judgment would be warranted and has made discovery requests that are unreasonably broad. *Cf. H.K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) ("When two parties have opposed each other in a protracted lawsuit tried to judgment, . . . it is well within [the court's] discretion to require the moving party to make a showing in support of its allegations before requiring the prevailing party to submit a second time to extensive discovery to protect his judgment.").

Petitioner cites *In re Kensington International, Ltd.*, 353 F.3d 211, 223-224 (3d Cir. 2003), for the proposition that a party seeking recusal of a district judge is entitled to reasonable discovery in support of a recusal motion. That decision has little relevance in this context. *Kensington* did not involve a party's attempt to upset a final judgment under Rule 60(b), but rather was decided on an interlocutory petition for mandamus. The *Kensington* court therefore had no occasion to address the special concerns that are raised when a party seeks to invalidate an adverse final judgment by arguing that the district judge who heard the case should have recused himself. Moreover, although in *Kensington* the court of appeals ordered discovery in support of a party's recusal motion, the court did not suggest that the proper standard of review of district court decisions denying such discovery should be anything other than abuse of discretion.

Petitioner also cites Judge Kozinski's concurring opinion in *United States* v. *Washington*, 98 F.3d 1159, 1166 (9th Cir. 1996), for the proposition that a litigant may be entitled to discovery in support of a Rule 60(b) motion arguing that the district judge should have been replaced. In fact, Judge Kozinski concurred with the panel's conclusion in that case that the district court had not abused its discretion in denying discovery related to a Rule 60(b) motion. *See id.* Moreover, Judge Kozinski did not dispute the proper standard of appellate review of such a ruling is abuse of discretion, and he noted that a litigant would be entitled to such discovery

only if it "acted in good faith and made out a reasonable case that discovery might lead to relevant information." *Id.*

Petitioner's discovery argument therefore reduces to the submission that the district court abused its discretion in denying him discovery in support of his Rule 60(b) motion. That fact-bound contention does not warrant review in this Court and is without merit in any event. Judge Sippel denied discovery only after stating on the record that he had not participated in the Pioneer litigation, had never worked on any saved seed cases, and had not worked on any matters for Monsanto since rejoining Husch & Eppenberger in 1995. Moreover, petitioner's discovery requests were hardly made in good faith: he sought discovery of, inter alia, information about every invention Monsanto licensed to Pioneer, every matter prior to January 30, 1998, in which any lawyer associated with Husch & Eppenberger formed an attorney-client relationship with Monsanto (including the amount of attorney's fees paid by Monsanto), the total amount of attorney's fees paid by Monsanto to Husch & Eppenberger during an eight-year period, and descriptions of every communication by Monsanto or any person on behalf of Monsanto to Judge Sippel during the two years that he worked for Congressman Gephardt. Under any standard, those requests were unreasonable, and that fact alone is sufficient to sustain Judge Sippel's decision to deny those requests.

3. None of petitioner's additional arguments in support of certiorari has merit. First, petitioner argues (Pet. 10-12) that the importance of the issues in this case is somehow exacerbated by the fact that Monsanto commonly requires growers such as petitioner to agree, as part of the licensing agreement granting growers access to Monsanto's patented biotechnology, that any dispute between the parties will be adjudicated in the United States District Court for the Eastern District of Missouri. This argument is without substance. That aspect of the licensing agreement has been upheld as an unexceptionable forum selection clause between the parties. *See Monsanto Co.* v. *McFarling*, 302 F.3d 1291, 1294-1296 (Fed. Cir. 2002), *cert. denied*, 537 U.S.

1232 (2003); *see also Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-594 (1991) (noting that "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions"). Growers who object to the clause are free to decline Monsanto's offer of a license and to purchase soybean or cottonseed that does not include Monsanto's patented biotechnology. *See id.* at 595 (upholding forum selection clause where, as here, parties were "given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity").

Petitioner states (Pet. 11-12) that growers who are required to litigate these cases in the Eastern District of Missouri are "entitled to the absolute assurance—once they get to St. Louis—of an impartial district judge who will show Monsanto no favoritism." Petitioner cannot seriously maintain that no judge in that judicial district could render impartial judgment for growers merely because Monsanto is located in that district. Moreover, under 28 U.S.C. § 455, litigants before any federal court, not just the Eastern District of Missouri, are entitled to a judge who not only is, but reasonably appears to be, impartial; no special rules apply to judges of the Eastern District of Missouri merely because Monsanto resides there. Petitioner does not argue, in any event, that Judge Sippel did not *actually* render impartial justice in this case. Rather, petitioner's sole argument is that Judge Sippel's appearance on papers for Monsanto in an unrelated matter on which he did no work cast doubt on the appearance of his impartiality between the parties. As explained above (pp. 12-15, *supra*), that contention is without merit.

Petitioner also argues (Pet. 14-15) that the district court's "pattern of rulings" against him supports the inference that the district judge did not appear impartial. Those

rulings, however, reflected an entirely proper response on the part of the district court to petitioner's outrageous misconduct, which was demonstrated at every stage of this case. *See* pp. 3-4, *supra*; *Ralph I*, 382 F.3d at 1380-1382. Petitioner's infringement was plainly willful, and his willful misconduct amply justified a trebling of infringement damages under 35 U.S.C. § 284. Indeed, petitioner did not challenge the trebling of the infringement damages on appeal to the Federal Circuit.

In concluding that treble damages were warranted, the district court first remarked that "it is not the goal of this Court or the goal of the law or the goal of justice to put [petitioner] in a position to crush him." *Ralph I* C.A. App. 5934. The court then stressed, however, that "I cannot imagine more egregious conduct. I hope I never confront it by a litigant to a party who knowingly lies, knowingly uses the Court's order to hide more lies." *Id.* at 5936. The court also emphasized "[t]he duration of the conduct, the fact that . . . it continued through litigation," and the fact that petitioner "took no remedial action to correct his problems. He only exacerbated them." *Id.* at 5939. Those factors were fully sufficient to sustain the award of treble damages.

Similarly, the district court's decision to strike petitioner's pleadings was fully justified, as the Federal Circuit held on the prior appeal in this case. In rejecting petitioner's argument that a lesser sanction, such as a presumption that all the destroyed bags of seed contained infringing product, would have been sufficient, the Federal Circuit observed that this sanction "would have trivialized the magnitude of the harm caused by Ralph's behavior." *Ralph I*, 382 F.3d at 1381. The court of appeals further noted that other cases where dismissal sanctions were reversed on appeal were readily distinguishable because they "did not involve findings of willful violation of court orders, destruction of evidence, or subornation of perjury, as were present in this case." *Id.*

In the end, petitioner's objection to Judge Sippel is not that Judge Sippel provided an unfair hearing of his argu-

ments, but that Judge Sippel reacted as most district judges would to a similar tale of litigation abuse. As the court of appeals explained in upholding Judge Sippel's dismissal of petitioner's pleadings:

> The judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for delay and evasion are added burdens on litigation, causing waste of judicial and legal time, are unfair to the litigants and offend the administration of justice.

382 F.3d at 1381 (citation, brackets, and internal quotation marks omitted; capitalization altered). Petitioner has made no showing to suggest that this observation about his conduct was any less accurate than it was when the court of appeals made it a year ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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